Interest Rate Regulation Developments in 1995: Continuing Liberalization of State Credit Card Laws And "Non-filing" Insurance as "Interest" Under State Usury Laws

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INTRODUCTION

The purpose of this Article is to review recent developments concerning federal and state usury law. The Article includes a discussion of a number of state laws expanding the interest rate and fee-charging authority of banks and retail sellers under credit card accounts.[1] It also discusses an Alabama case holding that a "non-filing" insurance premium constituted a finance charge that caused the interest rate to exceed the statutory limit.[2]

STATE CREDIT CARD LAW DEVELOPMENTS

Continuing a trend evident in recent years,[3] state legislatures expanded the interest rate and fee-charging authority of banks and retail sellers con-

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1. *See infra* text accompanying notes 3-48.

2. *See infra* text accompanying notes 49-69.

3. Act of Sept. 29, 1994, ch. 1079, § 1, 1994 Cal. Legis. Serv. 5363, 5364 (codified at CAL. FIN. CODE § 4001(a) (West Supp. 1996)) (authorizing "supervised financial organizations" and "charge card issuers" to impose late fees and overlimit fees subject to certain limits); Act of May 31, 1994, ch. 271, § 13, 1994 Colo. Legis. Serv. 1322, 1326 (repealing COLO. REV. STAT. ANN. § 5-13-105 which represented Colorado's opt out of federal usury preemption under 12 U.S.C. §§ 1463(g), 1785(g) & 1831d (1994)); Act of Apr. 7, 1994, ch. 618, §§ 1, 5, 1994 Me. Laws 364, 364-65 (codified at ME. REV. STAT. ANN. tit. 9A, §§ 2-402(3)-(4), 2-501(1)(G) (West Supp. 1995)) (repealing 18% per year cap on finance charge rates for lender credit cards and authorizing deregulated annual fee and late fee not exceeding lesser of $10 or 5% of unpaid amount of installment if not paid within 15 days of due date); Act of Mar. 14, 1994, ch. 338, § 1, 1994 Miss. Laws 97 (codified at MISS. CODE ANN. § 75-17-1 (1991 & Supp. 1995)) (deregulating rate of finance charge until July 1, 1997 on credit sales under which original principal balance exceeds $2000).

cerning credit card transactions in 1995. This trend manifested itself in 1995 in several ways, three of which will be discussed.

REPEAL OF STATE OPT-OUT PROVISIONS

Congress enacted sections 521-523 of the Depository Institutions Regulation and Monetary Control Act of 1980 (DIDA)[4] to authorize federally-insured, state-chartered banks, and federally-chartered and federally-insured, state-chartered savings associations, and credit unions to charge interest at the greater of (i) one percent in excess of the ninety-day commercial paper discount rate in effect at the Federal Reserve Bank in the Federal Reserve District where the institution is located *or* (ii) the rate allowed by the laws of the state where the institution is located. Congress also authorized (in section 525 of DIDA) the state where the loan is "made" to reject such usury preemption.[5] Seven states and Puerto Rico acted to "opt-out" of sections 521-523.[6] Prior to 1995, however, three of those states repealed their opt-out provisions.[7] In 1995, two more states, Maine and North Carolina (with respect to loans, mortgages, credit sales, and advances made in the state on or after July 1, 1995), also repealed

4. Pub. L. No. 96-221, §§ 521-523, 94 Stat. 147, 164-66 (1980) (codified at 12 U.S.C. §§ 1785(g), 1831d (1988) (codifying § 523 and § 521, respectively)). Section 522 was repealed and reenacted in 1989. Pub. L. No. 101-73, §§ 301, 407, 103 Stat. 282, 363 (1989) (codified at 12 U.S.C. § 1463(g) (1994)).

5. Pub. L. No. 96-221, § 525, 94 Stat. 167 (1980) (current version at 12 U.S.C. § 1831d(a) (1994)).

6. *See* COLO. REV. STAT. ANN. § 5-13-104 (West 1989 & Supp. 1995), *repealed by* Act of May 31, 1994, ch. 271, § 12, 1994 Colo. Legis. Serv. 1322, 1326 (West); Act of May 10, 1980, ch. 1156, § 32, 1980 Iowa Acts 537, 547-48 (not codified); ME. REV. STAT. ANN. tit. 9A, § 1-110 (West Supp. 1995), *repealed by* Act of May 22, 1995, ch. 137, §§ 1-3, 1995 Me. Legis. Serv. 221 (West); MASS. GEN. LAWS ANN. ch. 183, § 63 (West 1991 & Supp. 1995), *amended by* Act of Dec. 27, 1994, ch. 246, §§ 1-3, 1994 Mass. Adv. Legis. Serv. 806, 806-07 (Law. Co-op.); Act of July 17, 1982, ch. 623, § 2, 1982 Neb. Laws 569, 570 (codified at NEB. REV. STAT. § 45-1,104 (1988)), *amended by* Act of Apr. 7, 1988, ch. 913, § 2, 1988 Neb. Laws 953, 953-54 (codified at NEB. REV. STAT. § 45-1,104 (1988)); Act, ch. 126, § 1, 1983 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 24-2.3 (1991)), *repealed by* Act of July 10, 1995, ch. 387, § 1, 1995 N.C. Sess. Laws 308 (codified at N.C. GEN. STAT. § 24-2.3 (1991 & Supp. 1995)) (as to loans, mortgages, credit sales, and advances made in the state on or after July 1, 1995); Act, ch. 45, § 50, 1981 Wis. Laws 586 (not codified); Act of June 14, 1980, No. 3, p. 871, § 1, 1980 P.R. Laws (codified at P.R. LAWS ANN. tit. 10, § 998*l*(c) (Supp. 1991)).

7. *See* COLO. REV. STAT. ANN. § 5-13-104 (West 1989 & Supp. 1995), *repealed by* Act of May 31, 1994, ch. 271, § 12, 1994 Colo. Legis. Serv. 1322, 1326 (West); MASS. GEN. LAWS ANN. ch. 183, § 63 (West 1991 & Supp. 1995), *amended by* Act of Dec. 27, 1994, ch. 246, §§ 1-3, 1994 Mass. Adv. Legis. Serv. 806, 806-07 (Law. Co-op.); Act of July 17, 1982, ch. 623, § 2, 1982 Neb. Law 569, 570 (codified at NEB. REV. STAT. 45-1,104 (1988)), *amended by* Act of Apr. 7, 1988, ch. 913, § 2, 1988 Neb. Laws 953, 953-54 (codified at NEB. REV. STAT. § 45-1,104 (1988)).

their opt-out provisions.[8] Thus, only two states (Iowa and Wisconsin) and Puerto Rico still retain their rejection[9] of the federal usury preemption embodied in sections 521-523 of DIDA.[10]

INTEREST RATE DEREGULATION

In 1995, six states either deregulated or repealed the sunset dates on deregulation of interest rates on credit card transactions. Connecticut amended its Open-End Credit statute to repeal the October 1, 1995 sunset date on deregulation of finance charge rates on seller-originated open-end credit plans and thus eliminated the reinstitution of a finance charge rate cap of eighteen percent per year.[11] Maine amended its Consumer Credit Code to provide that, with respect to consumer credit sales made pursuant to an open-end credit agreement in connection with which a credit card is issued, the finance charge may not exceed the charge set forth in the agreement between the consumer and the creditor.[12] North Dakota amended its Revolving Charge Accounts statutes to (i) repeal the cap of eighteen percent per year on the credit service charge a seller or holder could impose in connection with transactions made under a revolving charge agreement, and (ii) permit a charge in the amount agreed to by the parties.[13] Rhode Island amended its Truth-in-Lending and Retail Selling Act on revolving or open-end credit plans arising out of sales of consumer goods to provide that the agreement between the creditor and the retail buyer establishes the maximum interest rate.[14] Vermont amended its Interest statute to provide that, for a bank credit card account or revolving line of credit, the agreement between the lender and the borrower

8. ME. REV. STAT. ANN. tit. 9A, § 1-110 (West Supp. 1995), *repealed by* Act of May 22, 1995, ch. 137, §§ 1-3, 1995 Me. Legis. Serv. 221 (West); Act, ch. 126, § 1, 1983 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 24-2.3 (1991)), *repealed by* Act of July 10, 1995, ch. 387, § 1, 1995 N.C. Sess. Laws 308 (codified at N.C. GEN. STAT. § 24-2.3 (1991 & Supp. 1995)) (as to loans, mortgages, credit sales, and advances made in the state on or after July 1, 1995).

9. Act of May 10, 1980, ch. 1156, § 32, 1980 Iowa Acts 537, 547-48 (not codified); Act, ch. 45, § 50, 1981 Wis. Laws 586 (not codified); Act of June 14, 1980, No. 3, p. 871, § 1, 1980 P.R. Laws (codified at P.R. LAWS ANN. tit. 10, § 998*l*(c) (Supp. 1991)).

10. Pub. L. No. 96-221, §§ 521-523, 94 Stat. 147, 164-66 (1980), *amended by* Pub. L. No. 101-73, §§ 301, 407, 103 Stat. 282, 363 (1989) (codified at 12 U.S.C. §§ 1463(g), 1785(g), 1831d (1994)).

11. Act of June 6, 1995, P.A. 95-106, 1995 Conn. Legis. Serv. 221 (amending CONN. GEN. STAT. ANN. § 42-133c (West 1992 & Supp. 1995)).

12. Act of May 12, 1995, ch. 84, § 4, 1995 Me. Legis Serv. 157, 157 (West), *amending* ME. REV. STAT. ANN. tit. 9-A, § 2-202(7) (West 1980 & Supp. 1995)).

13. Act of Aug. 1, 1995, ch. 476, § 1, 1994 N.D. Laws (codified at N.D. CENT. CODE § 51-14-03 (Supp. 1995)).

14. Act of June 20, 1995, ch. 82, § 59, 1995 R.I. Pub. Laws (codified at R.I. GEN. LAWS § 6-27-4(c) (Supp. 1995)); Act of June 30, 1995, ch. 194, § 1, 1995 R.I. Pub. Laws (codified at R.I. GEN. LAWS § 6-27-4(c) (Supp. 1995)).

establishes the interest rate.[15] Finally, Washington amended its Retail Installment Sales of Goods and Services Act to repeal the June 30, 1995 sunset date on deregulation of finance charge rates on seller and non-financial institution-originated revolving credit plans and accordingly prevent the reinstitution of an eighteen percent per year cap on such rates.[16]

EXPANDED FEE AUTHORITY

State legislatures were active in enhancing the fee-charging authority of financial institutions and retail sellers under credit card accounts in 1995. While much of this activity concerned returned check fees and late fees, which will be discussed, a wide variety of fees were authorized.

Returned Check Fees

Eleven states enacted legislation during 1995 authorizing or increasing returned check fees on credit card accounts. In several instances, the legislation merely recodified existing fee authority in a new statute.[17] In other instances, the legislation was applicable to returned checks generally.[18] Arkansas amended its Hot Check Collection Fee statute to increase, from fifteen to twenty dollars, the maximum amount of the collection fee that the holder of a check that is dishonored due to insufficient funds may collect if the check is not paid within fifteen days after written notice is mailed or delivered to the drawer of the check.[19] Georgia amended its Returned Check statute to increase the maximum returned check charge from the greater of twenty dollars or five percent of the amount of the check to the greater of twenty-five dollars or five percent of the amount of the check.[20] Indiana amended its Uniform Commercial Code to permit a returned check fee of up to twenty dollars plus the actual charge by the depository institution.[21] Iowa amended two returned check fee provisions. The Iowa Consumer Credit Code was amended to increase the maximum returned check fee from ten dollars to the greater of twenty dollars or five

15. Act of July 1, 1995, No. 9, § 1, 1995 Vt. Laws 28 (effective July 1, 1995) (to be codified at VT. STAT. ANN. tit. 9, § 41a(b)(3)).

16. Act of May 5, 1995, ch. 249, § 1, 1995 Wash. Legis. Serv. 644 (West), *repealing* WASH. REV. CODE ANN. § 63.14.135 (West Supp. 1996); Act, ch. 193, § 4, 1992 Wash. Laws 849 (not codified).

17. *See infra* text accompanying notes 26-27, 29.

18. *See infra* text accompanying notes 19-21, 24, 28.

19. Act of Mar. 16, 1995, Act 1004, § 1, 1995 Ark. Acts 176, *amending* ARK. CODE ANN. § 4-60-103 (Michie 1991).

20. Act of July 1, 1995, No. 411, § 2, 1995 Ga. Laws 910, 911, *amending* GA. CODE ANN. § 16-9-20(j) (1992 & Supp. 1995). The fee may be imposed "notwithstanding . . . any other law on usury, charges, or fees." GA. CODE ANN. § 16-9-20(i) (1992 & Supp. 1995).

21. Act of July 1, 1995, Pub. L. 248-1995, § 3, 1995 Ind. Acts (codified at IND. CODE ANN. § 26-1-3.1-502.5 (Burns Supp. 1995)).

percent of the amount of the instrument.[22] In addition, the Iowa Uniform Commercial Code was amended to increase the maximum returned check fee from fifteen dollars[23] to the greater of twenty dollars or five percent of the amount of the instrument.[24] Maine authorized a "supervised financial organization" to impose, *inter alia*, "return-payment charges" on lender credit cards as the open-end credit plan may provide.[25]

Minnesota authorized a "financial institution" to impose a returned check charge of the greater of twenty dollars or the actual costs of collection (not exceeding thirty dollars) on open-end credit plans,[26] although this charge already was authorized on open-end credit plans of banks and savings associations.[27] Montana enacted a Returned Check statute to permit a service charge in a reasonable amount, not to exceed thirty dollars, for any dishonored check, if a written demand is sent to the drawer's last known address.[28] Nevada enacted a new "Financial Institutions Credit Card" statute, which permits fees and charges, including without limitation returned check charges, imposed for the use of a credit card in an amount agreed upon by the issuer and the cardholder.[29] New Jersey amended its Retail Installment Sales statutes to permit a returned check fee of twenty dollars on any check returned to the holder uncollected due

22. Act of May 1, 1995, No. 151, § 1, 1995 Iowa Legis. Serv. 371 (West), *amending* IOWA CODE ANN. § 537.2501(1)(g) (West Supp. 1995).

23. Act of May 10, 1994, ch. 1167, § 121, 1994 Iowa Legis. Serv. 444, 489 (West), *repealing* IOWA CODE ANN. § 554.3507 (West).

24. Act of May 1, 1995, No. 151, § 2, 1995 Iowa Legis. Serv. 371, 371-72 (West) (to be codified at IOWA CODE ANN. § 554.3512 (West)). The amount of the surcharge may not exceed $20 unless the instrument was presented twice or the issuer does not have an account with the drawee, in which case the surcharge may not exceed $50. *Id.*

25. Act of May 22, 1995, ch. 137, § 5, 1995 Me. Legis. Serv. 221, 222 (West) (codified at ME. REV. STAT. ANN. tit. 9-A, § 2-501(4) (West Supp. 1995)); *see also* ME. REV. STAT. ANN. tit. 9-A, § 1-301(22), (38), (39) (West 1980 & Supp. 1995) (defining "lender credit card," "supervised financial organization" and "supervised lender" respectively).

26. Act of May 24, 1995, ch. 202, art. 3, § 1(6)(a)(5), 1995 Minn. Sess. Law Serv. 600, 624 (West) (codified at MINN. STAT. ANN. § 47.59(1)(k), (6)(a)(5) (West Supp. 1996)); *see also* MINN. STAT. ANN. § 332.50 (West Supp. 1995) (stating "financial institution" includes, *inter alia*, a state or federally-chartered bank, savings bank, or savings association).

27. MINN. STAT. ANN. §§ 48.185(4)(d)(3) (West 1988 & Supp. 1996); *see also id.* § 332.50 (West Supp. 1995) (stating that a fee may be imposed if no annual fee is imposed).

28. Act of Oct. 1, 1995, ch. 304, 1995 Mont. Laws 915, 915-16, *amending* MONT. CODE ANN. § 27-1-717 (1994).

29. Act of Oct. 1, 1995, ch. 516, § 15(3), 1995 Nev. Stat. 1711, 1718-19; *see also* Nevada Retail Installment Sales open-end credit fee provision, NEV. REV. STAT. ANN. § 97.245(1) (Michie 1994 & Supp. 1995) (allowing any fee agreed upon by the parties on retail (open-end) charge agreements). Nevada's statutes governing retail installment sales of goods and services (NEV. REV. STAT. ANN. §§ 97.105 to .335 (Michie 1994 & Supp. 1995)) were rendered inapplicable to "financial institution" credit card accounts. Act of Oct. 1, 1995, ch. 535, §§ 7, 9, 1995 Nev. Stat. (codified at NEV. REV. STAT. ANN. §§ 97.95, .125 (Michie 1994 & Supp. 1995)); Act of Oct. 1, 1995, ch. 680, §§ 22-23, 1995 Nev. Stat. (codified at NEV. REV. STAT. ANN. §§ 97.95, .125 (Michie 1994 & Supp. 1995)).

to insufficient funds in the buyer's account.[30] Rhode Island enacted a new Lenders and Loan Brokers statute,[31] authorizing any lender to charge, contract for, and receive fees and charges on the unpaid balance of a loan at a rate not exceeding that provided in section 6-26-2 of the Rhode Island Interest-Usury statute[32] or as otherwise permitted under applicable federal law or regulation.[33] Finally, Vermont amended its Interest statute to permit "reasonable fees associated with a credit card, agreed upon by the lender and borrower."[34]

Late Fees

Eleven states and the District of Columbia enacted legislation during 1995 authorizing or increasing late fees on credit card accounts. In several instances, as with returned check fees, the legislation substantially recodified existing fee authority in a new statute.[35] Arizona amended its Retail Installment Sales Transactions Act generally to increase the maximum permissible late fee for any payment not received within ten days of the due date from the lesser of ten dollars or five percent of the installment to five dollars on an installment of twenty-five dollars or less and ten dollars on an installment greater than twenty-five dollars.[36] The District of Columbia amended its Revolving Credit Accounts statute to authorize a seller or financial institution to impose a late fee not exceeding fifteen dollars on any minimum payment not made within ten days of the due date.[37] Georgia amended its Retail Installment and Home Solicitation Sales Act to increase the maximum permissible late fee from five dollars to ten dollars.[38] Iowa amended its Consumer Credit Code to permit a late fee on

30. Act of Mar. 17, 1995, ch. 53, § 9, 1995 N.J. Sess. Law Serv. 193, 199 (West) (to be codified at N.J. STAT. ANN. § 17:16C-42(c) (West)).

31. R.I. GEN. LAWS §§ 19-14-1 to -2 (1989 & Supp. 1995).

32. *Id.* § 6-26-2(c) (1992 & Supp. 1995) (neither specifically authorizing nor specifically prohibiting returned check fees).

33. *Id.* §§ 19-14-1 to -2.

34. Act of July 1, 1995, No. 9, § 2, 1995 Vt. Laws 39 (to be codified at VT. STAT. ANN. tit. 9, § 42(a)(8)).

35. *See infra* text accompanying notes 42 and 45.

36. Act of Apr. 18, 1995, ch. 164, § 2, 1995 Ariz. Legis. Serv. 1208, 1210 (West) (codified at ARIZ. REV. STAT. ANN. § 44-6002(G) (1994 & Supp. 1995) (original version at ARIZ. REV. STAT. ANN. § 44-6002(F) (1994)).

37. Act of May 15, 1995, No. 11-54, 1995 D.C. Stat., *amending* D.C. CODE ANN. § 28-3702 (1991). Written notice of the new fee must be mailed to each affected buyer at least 30 days before the effective date of the change, and the buyer must be permitted to repay any pre-effective date debt under the existing terms, unless the buyer incurs additional debt on or after that date or otherwise agrees in writing to the change. *Id.*

38. Act of July 1, 1995, No. 266, § 1, 1995 Ga. Laws 346, 346-47, *amending* GA. CODE ANN. § 10-1-7(a) (1994 & Supp. 1995).

private-label credit cards not to exceed ten dollars.[39] Louisiana amended its Consumer Credit Law to increase the delinquency charge permitted on a lender credit card account or revolving loan account from the lesser of fifteen dollars or five percent of the unpaid amount of the installment if not paid in full within ten days of the payment due date to a charge not exceeding fifteen dollars on any regularly scheduled payment not received within ten days of the payment due date.[40] Maine authorized a "supervised financial organization" to impose, *inter alia*, a late charge on any unpaid installments or portions thereof that are not paid in full within fifteen days after the scheduled or deferred due date.[41] Minnesota enacted two late fee provisions. A "financial institution" may impose a delinquency charge not exceeding the greater of five percent of the amount of the minimum payment due or five dollars and twenty cents, if the payment is not paid in full within ten days after the due date.[42] In addition, a new provision under the Minnesota Interest-Usury statute authorizes a seller or holder, in connection with an open-end credit plan that so provides, to collect a delinquency charge and collection charge on each installment at least ten days in arrears in an amount not exceeding any such charge that may be imposed on Minnesota residents by any state or national bank.[43]

Nebraska amended its Revolving Charge Agreements statute to permit a late fee not exceeding the greater of five dollars or five percent of the amount due for each payment in default for at least ten days.[44] As noted with respect to returned check fees, Nevada's new Financial Institutions Credit Card statute permits fees and charges, including without limitation late fees, to be imposed for the use of a credit card in an amount agreed upon by the issuer and the cardholder.[45] New Jersey amended its Retail

39. Act of Apr. 27, 1995, No. 104, § 1, 1995 Iowa Legis. Serv. 165 (West) (to be codified at IOWA CODE ANN. § 537.2502(8) (West)). The fee may be imposed on any payment not paid in full within 30 days of its due date and may be assessed only "once on any one payment, regardless of the length of time the payment remains delinquent." *Id.*

40. Act of June 29, 1995, Act 1184, § 2, 1995 La. Acts (codified at LA. REV. STAT. ANN. § 9:3527(B) (West 1991 & Supp. 1996)).

41. Act of May 22, 1995, ch. 137, § 5, 1995 Me. Legis. Serv. 221, 222 (West) (codified at ME. REV. STAT. ANN. tit. 9-A, § 2-501(4) (West Supp. 1995)); *see also* ME. REV. STAT. ANN. tit. 9-A, § 1-301(22), (38), (39) (West 1980 & Supp. 1995) (defining "lender credit card," "supervised financial organization" and "supervised lender" respectively).

42. Act of May 24, 1995, ch. 202, art. 3, § 1(6)(a)(5), 1995 Minn. Sess. Law Serv. 600, 624 (West) (codified at MINN. STAT. ANN. § 47.59(1)(k), (6)(a)(5) (West Supp. 1996)); *see also* MINN. STAT. ANN. § 51A.385(5)(c)(3) (West Supp. 1995), *repealed by* Act of May 24, 1995, ch. 202, art. 3, § 22, 1995 Minn. Sess. Law Serv. 600, 636 (West) (authorizing delinquency charge on any payment not paid in full within 10 days after due date in amount not exceeding 5% of amount of payment).

43. Act of May 24, 1995, ch. 202, art. 3, § 21, 1995 Minn. Sess. Law Serv. 600, 635-36 (to be codified at MINN. STAT. ANN. § 334.171 (West)).

44. Act of Sept. 9, 1995, ch. 614, § 2, 1995 Neb. Laws 1162, 1164-65 (to be codified at NEB. REV. STAT. § 45-205). The charge may be collected only once on each payment, no matter how long the payment remains in default. *Id.*

45. *See supra* note 29.

Installment Sales statute to permit a late fee of ten dollars on any minimum payment that is not paid within ten days after its due date.[46] As noted with respect to returned check fees, under the new Rhode Island Lenders and Loan Brokers statute, any lender may charge, contract for, and receive fees and charges on the unpaid balance of a loan at a rate not exceeding that provided in section 6-26-2 of the Rhode Island Interest-Usury statute, or as otherwise permitted under applicable federal law or regulation.[47] Finally, Vermont amended its Interest statute to permit "reasonable fees associated with a credit card, agreed upon by the lender and borrower, including late charges."[48]

"NON-FILING" INSURANCE AS "INTEREST"

A facially innocuous charge—"non-filing" insurance—has become controversial as some policy providers allegedly have used it as a vehicle to create a default reserve. As so construed, this insurance tracks issues raised in the recent wave of litigation over add-on charges to force-placed property insurance.[49]

The purpose of non-filing insurance is to protect lenders against adverse consequences of failing to perfect their security interest by public filing. This is a very limited risk, as it is triggered only when another secured party obtains priority as a result of the creditor's failure to record its lien.[50] In practice, the insured risk is even narrower, as non-filing insurance appears to be purchased almost exclusively in conjunction with furniture and appliance retail installment sales purchases and finance company loans secured by household goods.[51] As to the former category, the risk is narrow because purchase money security interests in consumer goods (other than titled motor vehicles and boats) generally are *automatically* perfected under the Uniform Commercial Code (U.C.C.), and thus filing is not necessary

46. Act of Mar. 17, 1995, ch. 53, § 9, 1995 N.J. Sess. Law Serv. 193, 199 (West) (to be codified at N.J. STAT. ANN. § 17:16C-42(c) (West)). The fee must be provided for in the agreement and may be collected only once on each minimum payment due however long it remains in default. *Id.*

47. R.I. GEN. LAWS § 6-26-2(c) (1992 & Supp. 1995) (neither specifically authorizing nor specifically prohibiting returned check fees).

48. Act of July 1, 1995, No. 9, § 2, 1995 Vt. Laws 39 (to be codified at VT. STAT. ANN. tit. 9, § 42(a)(8)).

49. *See, e.g.*, Martha Brannigan, *Why a Mississippi Jury Found a Small Dispute Worth $38 Million*, WALL ST. J., Apr. 12, 1995, at A1.

50. *See, e.g.*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 26-4 (3d ed. 1988).

51. Though the Federal Trade Commission Credit Practices Rule prohibits non-purchase money security interests in basic household goods, 16 C.F.R. § 444.2 (1995), as do some parallel state laws, the legal definition of "household goods" has some significant exclusions. *Id.* Consequently, it is common to find finance company non-purchase money loans secured by the family's bicycle, fishing pole, second television, or VCR.

to obtain a perfected security interest.[52] As to the latter category, used furniture is of so little value as collateral that, according to testimony evidenced in hearings on the Federal Trade Commission (FTC) Credit Practices Rule, it is taken primarily for *in terrorem* collection purposes,[53] although the prospect of added credit property insurance also is an attraction.[54]

State retail installment sales acts and consumer finance laws may specify non-filing insurance as an authorized charge, usually tracking the restriction included in the Truth-in-Lending Act's treatment of these premiums.[55] For the charge to be permissible, the insurance must be in lieu of perfecting a security interest, and limited to the amount of the otherwise applicable filing fee.[56]

Insurers have designed non-filing insurance that acts more like a default reserve, or credit loss insurance, than like non-filing insurance. The amounts paid in premiums are returned to creditors as a result of claims submitted for a wide variety of losses, including bankruptcy, skips, and charge-offs.[57] The charges for this insurance are, according to an Alabama court, "interest" for usury law purposes.[58]

52. U.C.C. §§ 9-302(1)(d), 9-307(2) (1994); WHITE & SUMMERS, *supra* note 50, §§ 24-9, 26-15. There is only one very narrow exception: bona fide purchasers who buy from the consumer have priority over holders of unfiled purchase money security interests in consumer goods.

53. Federal Trade Commission, Credit Practices: Staff Report and Recommendations on Proposed TRR, 16 C.F.R. Pt. 444, Pub. Rec. 215-42, 206-28 (Aug. 1980).

54. *See generally* NATIONAL CONSUMER LAW CENTER, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES § 8.5.4.4 (1995) [hereinafter COST OF CREDIT].

55. *Compare* 15 U.S.C. § 1605(d)(2) (1994) (TIL) *with* N.C. GEN. STAT. § 25A-10(2) (1991) (Retail Installment Sales Act).

56. 15 U.S.C. § 1605(d)(2) (1994); 12 C.F.R. § 226.4(e)(2) (1995).

57. The insurer retains a portion as an administrative fee, so something less than the full premium pool is returned to the creditors. *See generally* COST OF CREDIT, *supra* note 54, at § 8.5.4.5.

58. Whitson v. Warehouse Home Furnishings, Civ. Action No. Cv-94-177, slip op. (Cir. Ct. for Talladega Cty., Ala. Aug. 17, 1995) (rejecting as unpersuasive Mitchell v. Industrial Credit Corp., 898 F. Supp. 1518 (N.D. Ala. 1995)). There was also a recent decision under the Truth-in-Lending Act, 15 U.S.C. §§ 1601-1693(n) (1994) (TIL). *See* Pinkston v. Security Fin. Corp., No. 94-11082, slip op. (Bankr. S.D. Ga. May 31, 1995). The court held it was not a TIL violation to exclude the premium from the finance charge because the default insurance coverage was an additional coverage, which "simply augments the coverage for the same price, a benefit to the lender-insured which comes at no cost to the borrower." *Id.* at 10. It is highly doubtful that the issue of pricing the separate coverages under this policy was actually litigated in this Chapter 13 bankruptcy case, as, if it had, the more likely finding would have been similar to the "premium shift" found in the force-placed insurance context. For example, in Smith v. Trustmark Nat'l Bank, No. 93-4-47 (Cir. Ct. of Jones Cty., Miss. Aug. 4, 1995) (order of remitter), the default insurance premium portion of the force-placed insurance was $14,916, while benefits collected under it exceeded $1 million dollars. The premiums charged the borrowers were over $1 million dollars, and borrowers received benefits under the collateral protection portion of less $240,000. The jury apparently felt that the $1 million dollars collected from the borrowers was subsidizing the creditors' credit-loss protection. Similarly, because non-filing risk is so narrow, it is likely that a close financial

In *Whitson v. Warehouse Home Furnishings*,[59] the court held that the non-filing insurance premium was a finance charge under Alabama's Mini-Code.[60] In this class action, the plaintiffs had alleged three alternative grounds under which the coverage violated the law: (i) it did not constitute "insurance;" (ii) if insurance, it was default insurance, not non-filing insurance; or (iii) it was not purchased "in lieu of perfecting a security interest" as required by law. The court upheld all of the plaintiffs' arguments.[61]

Noting that essential characteristics of "insurance" are risk-shifting and distribution of risk by pooling premiums from similarly situated persons, the court found that the arrangements under the challenged policy displayed neither element.[62] There was no risk shifted to the insurer because (i) it never was liable for more than ninety-three percent of the premiums paid by the creditor[63] and (ii) the payout was derived entirely from the premiums the creditor had paid.[64] Moreover, because losses on which claims were paid included losses due to bankruptcy, skips, and destroyed goods, the coverage was default insurance, not non-filing insurance.[65] Finally, given that the contracts at issue were all purchase-money transactions involving consumer goods having a purchase price of less than $2000, the security interests were automatically perfected and therefore the insurance was not "in lieu of perfecting" a security interest.[66]

As these retail installment contracts had been written at or close to the Alabama interest rate ceiling, factoring in the cost of the premium caused the rates on the loans to exceed the statutory maximum, leading to severe penalties. Not only did the court order the forfeiture of all finance charges

analysis would reveal a similar premium shift in the non-filing context.

Other TIL challenges include Dixon v. S&S Loan Serv., 754 F. Supp. 1567, 1572-74 (S.D. Ga. 1990) (denying in part creditor's motion for summary judgment); Walmsley v. Mercury Fin. Co., Clearinghouse No. 49,164 (S.D. Fla. Sept. 10, 1993) (order regarding motions to dismiss). A Georgia court also recently denied class certification in a TIL challenge to non-filing insurance. Leverett v. Heilig-Meyers Furniture Co., Civ. 194-158 (S.D. Ga. Aug. 28, 1995) (order denying class certification). The court found (i) the creditors' collection counterclaims would be compulsory, in accordance with the Fifth Circuit's singular stance on this rule; (ii) contrary to the standard for TIL liability, there was no monetary damage; and (iii) the plaintiffs had an adverse interest because "requiring lenders to report non-filing insurance as a "finance charge" could result in a tightening of the credit market to the possible disadvantage of the putative class." *Id.*

59. Civ. Action No. Cv-94-177 (Cir. Ct. for Talladega Cty., Ala. Aug. 17, 1995) (order).

60. ALA. CODE ch. 5-19 (1975 & Supp. 1994).

61. *Whitson*, Civ. Action No. Cv.-94-177, slip op. at 11.

62. *Id.*

63. *Id.* The insurer kept 7% as an administrative fee.

64. *Id.*

65. *Id.* The court distinguished Pinkston v. Security Fin. Corp., No. 94-11082, slip op. (Bankr. S.D. Ga. May 31, 1995), noting that the factual evidence missing in *Pinkston* had been abundantly proven in this case. *Whitson*, Civ. Action No. Cv-94-177, slip op. at 11.

66. *Id.*

but it found that the charge was imposed deliberately.[67] As such, the court imposed the further penalty of voiding all the loans and returning to plaintiffs all money paid.[68] The court proceeded to note that while this was a substantial penalty, it was the one provided for by the statute and hence it was the court's duty to impose the penalty:

> Having said that, it is pointed out that the wrongful conduct herein exacted a very substantial penalty in the form of illegal 'non-filing insurance' fees and excessive interest charges on a segment of our society who could least afford such a penalty. This is the very conduct which the Legislature intended to stop. . . .[69]

67. *Id.*

68. *Id.* Earlier, a proposed class settlement was disapproved by an Alabama court on the grounds that, given the likelihood of success on the merits of the state claim, the relief to class members was inadequate. *See Proposed Class Settlement Disallowed in Nonfiling Insurance Case,* 13 NCLC REPORTS 22 (May/June 1995).

69. *Whitson,* Civ. Action No. Cv-94-177, slip. op. at 19-20.